3. FBI Participation in the Determination Must Be on the Record.

Unlike Section 107(c) extension requests, Section 109(b) does not provide for special participation by the Attorney General and her delegatee, the FBI, in the Commission's determination of whether compliance is reasonably achievable.[43] Section 109(b) requires only notice of a petition be given to the FBI prior to the Commission making its determination.[44]

Because the FBI is given no special role in a reasonable achievability proceeding, its participation in Section 109(b) determinations must be similar to that of other participants. All filings or ex parte presentations by the FBI relating to these petitions in the public record should be disclosed, and petitioners should be given the opportunity to respond to any issues raised in these filings. It was not the intent of Congress to permit the FBI to have even the appearance of undue influence in any determination of whether compliance is reasonably achievable. Therefore, it is important that the Commission ensure by full public disclosure of FBI participation that this does not occur.

4. Filing of a Petition Should Toll the Compliance Deadline.

Section 109 allows the Commission up to one year to make its determination on a reasonable achievability petition. The industry is less than one year away from the CALEA compliance deadline and hardware or software to implement the industry standard is not available yet. Thus, the Commission should expect that some carriers may file petitions soon, but that a

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[43] 47 U.S.C. § 1006(c). The Attorney General has delegated her authority under CALEA to the Director of the FBI or his designees. 28 C.F.R. § 0.85(b).

[44] 47 U.S.C. § 1008(b).

gap might occur before the Commission's decision and the compliance date during which carrier responsibilities would be in doubt.[45]

The filing of a petition for determination of whether compliance is reasonably achievable should toll the compliance deadline automatically until the Commission makes a determination and takes formal action on the petition. If compliance is determined to be reasonably achievable, carriers additionally will need a reasonable period of time to implement the technology.

The grant of automatic extensions and tolling of deadlines by the Commission is not without Commission precedent. For example, Part 22 rules allow an automatic extension of the construction period to public mobile service licensees that file an application prior to their construction deadline to relocate a transmitter due to circumstances beyond their control.[46] Also, licensees whose applications are denied often are given a period of time in which to comply that takes into account the length of time it took the Commission to act on the request.[47] And, under 47 C.F.R. § 90.629, specialized mobile radio licensees whose extended implementation authority is terminated by the Commission are given an automatic six months from the date of termination to complete system construction.

Absent tolling and a petition schedule, there is no guarantee that the Commission will act on a petition before the compliance date. Because penalties for noncompliance can cost carriers up to $10,000 per day in fines, it is likely that many carriers are planning petitions today.

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[45] Section 107(a)(3)(B) provides that the absence of standards to implement CALEA does not relieve a carrier from its obligations.

[46] See 47 C.F.R. § 22.142(d).

[47] See, e.g., In re Applications of Petroleum Communications, Inc., 12 FCC Rcd 2996, 2997 n.5 (1997).

The Commission should act now to stem that tide. AT&T would support a deadline for the filing of requests a certain number of days prior to the initial deadline for CALEA compliance to ensure that carriers do not use the request process merely as a means of extending the date for compliance.[48]

5. Finding of Not Reasonably Achievable Should Act to Grandfather the Equipment, Facility or Service at the Baseline.

Once a determination has been made that compliance is not reasonably achievable, the equipment, facility or service is deemed to be in compliance just as if it had been installed or deployed prior to January 1, 1995. Until the Attorney General agrees to pay for the costs of compliance, the carrier should have no further responsibilities for CALEA compliance with respect to that equipment, facility or service until the equipment, facility or service has been replaced, significantly upgraded or undergoes major modification. In other words, a carrier simply cannot grow into "achievability" over time. The Commission should state this expressly.

B. Extension of the Compliance Date

1. The Section 107(c) Determination Should Focus on Commercial Availability of Technology.

The Commission requests comments on whether the Section 107(c) "reasonably achievable" extension criteria should be the same as the Section 109 criteria discussed above.[49]

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[48] CALEA does not limit reasonable achievability petitions to during the transition period between January 1995 and October 1998. New technologies may be deployed after October 1998 that for whatever reason are not CALEA-compliant. The rules that the Commission promulgates here will have force and effect after the original compliance date and the Commission will be called upon to toll compliance in general pending its determination. There can be no doubt that the Commission has such authority reading Sections 107, 109 and 207 together.

[49] NPRM, ¶ 50.

The Commission places the emphasis on the wrong part of Section 107 and therefore it is necessary to put Section 107(c) in context.

Section 107(c)(2) provides as grounds for an extension:

> The Commission may, after consultation with the Attorney General, grant an extension under this subsection, if the Commission determines that compliance with the assistance capability requirements under section 103 is not reasonably achievable through application of technology available within the compliance period.

The purpose of this provision is to permit carriers to obtain an extension of the CALEA compliance date for equipment, facilities or services installed or deployed, or planned for installation or deployment, prior to the compliance date if the technology necessary for compliance is not commercially available. Congress recognized that CALEA-compliant technology may not be available during the transition period between the effective date of CALEA and its compliance date four years later and it was not the intent of Congress to prevent expansion of services while waiting for manufacturers to develop and make available such equipment.[50]

Second, CALEA contemplated an industry standards effort to develop solutions. CALEA requires, under Section 106, that carriers consult with manufacturers in order that manufacturers can "make available" such features or modifications necessary to meet CALEA.[51] The term "available" in Section 107 should be read consistent with the use of the term in Section 106, and therefore, "available" must mean that a carrier's vendor has developed the CALEA product for implementation.

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50 See House Report at 3498-3499.

51 47 U.S.C. § 1005.

Third, there are over 3000 carriers in the United States and the industry standard has just been published. The Commission can expect a flood of extension petitions as the compliance date nears, but standard-compliant hardware or software is not yet available. This flood of petitions can be avoided if the Commission acknowledges that the lack of a standard means that commercially available technology does not exist and therefore a blanket extension is necessary. Without this extension, carriers will either seek nonstandard solutions to meet CALEA rather than risk enforcement penalties or will seek an extension of the compliance date or petition that implementation is not reasonably achievable.

Fourth, the use of "reasonably achievable" in conjunction with the terms "commercially available" means that not only must there be a commercially available solution, but that solution cannot otherwise be cost prohibitive. This is where the Section 109(b) factors can play a role and, AT&T would agree, a substantially similar role in the Section 107(c) extension request process as in the Section 109 reasonably achievable petition process.

If technology is commercially available, then Section 109(b) factors should be considered to determine whether these capabilities are reasonably achievable by the compliance deadline or whether they may be reasonably achievable at some later time. For example, carriers may need time to obtain the necessary capital to invest in CALEA equipment or may be undergoing temporary financial hardships that make CALEA investment difficult prior to the compliance deadline. In addition, a company may lack other resources necessary to meet the deadline for CALEA compliance but will have the ability to implement CALEA capabilities when these resources become available. Moreover, if the probability of wiretaps is very low anyway, the carrier should be able to obtain an extension rather than making additional expenditures for contract help or services in the short run that could ultimately be avoided if additional time were granted.

Although the focus of this analysis should be the commercial availability of technology for implementation of CALEA capabilities, AT&T urges the Commission to consider additional factors in its analysis of petitions for extension. First, the Commission should consider whether the intercept can be performed by another carrier or elsewhere. In the case of wireless carriers interconnected with the public switched network, interception by the local exchange carrier at the switch may be possible and would meet law enforcement needs until better technology becomes available.

Second, the Commission should consider good faith efforts of the carrier toward CALEA implementation. If the carrier has been diligent in working toward CALEA compliance, but needs additional time due to circumstances beyond its control, such as delays in obtaining equipment or problems in deployment, the carrier should be protected from the enforcement provisions of CALEA, including penalties, by a reasonable extension of time in which to implement its surveillance capabilities. At the same time, a carrier who has made no effort to undertake compliance activities may not warrant such consideration. These two additional factors serve the intent of CALEA by bringing in other important considerations that will assist the Commission in balancing law enforcement needs against the interests of the telecommunications industry.

In granting or denying the petition, the Commission should make express findings of fact on each criterion applied in the analysis in a written decision. Because Section 107(c) provides for consultation by the Commission with the FBI in its consideration of an extension, failure to disclose these findings of the Commission could give law enforcement the appearance of undue influence in the extension process by submission of opinions and facts that would not be subject to challenge by interested parties.

The Commission also should address whether a Section 109 petition is subsumed in a Section 107 petition, at least during the transition period between January 1995 and October 1998. Carriers should be able to petition for a Section 109(b) determination in conjunction with a Section 107(c) determination. If the Commission finds that technology is commercially available to meet CALEA compliance by the deadline, the carrier should be entitled to a determination of whether compliance is reasonably achievable under an application of the Section 109(b) factors in which the Commission is weighing the costs and benefits of that compliance over the long run. On the other hand, a determination that technology is not commercially available should yield an extension rather than a "not reasonably achievable" determination in order that the issue of whether compliance is "reasonably achievable" can be revisited as CALEA compliance technology becomes more available and the costs of compliance are more fully known.

As with a Section 109(b) petition, a Section 107(c) petition should toll the compliance deadline if the petition is timely filed. If the extension is denied, the carrier who has petitioned in good faith for an extension should have a reasonable period of time in which to implement compliance. The Commission could set a deadline for extension requests in advance of the compliance deadline in order to discourage use of a petition for extension merely as a last-minute effort to buy additional time to comply when failure to comply is due to the carrier's lack of diligence.

2. Carrier Trade Associations Should Be Permitted to Petition for Extensions on Behalf of Carriers.

As stated earlier, the lack of technical standards has delayed the development of commercially available CALEA technology and makes compliance for the wireless industry not reasonably achievable through application of available technology. The absence of available technology for specific classes of carriers could be better addressed in a single petition for extension by the relevant carrier trade association or industry group. This would spare the

Commission the administrative cost and burden of reviewing and responding to multiple petitions addressing the same set of issues and spare carriers the expense of preparing these petitions. Otherwise, the Commission may find itself in the position of having to devote its limited resources to examining the networks of each carrier in detail in order to arrive at the same conclusion. With multiple petitions, processing backlogs are also likely. Under such a scenario, compliance could be held in abeyance for a far greater period of time than the maximum two-year extension that might be granted on the basis of the single petition. Thus, industry association petitions may serve to expedite implementation.

C. Carrier Security Policies and Procedures Systems Security and Integrity

Section 105 of CALEA states:

> A telecommunications carrier shall ensure that any interception of communications or access to call-identifying information effected within its switching premises can be activated only in accordance with a court order or other lawful authorization and with the affirmative intervention of an individual officer or employee of the carrier acting in accordance with regulations prescribed by the Commission.

Section 229 of the Communications Act directs the Commission to prescribe rules to implement Section 105 of CALEA. The Commission has proposed rules to be codified in Part 64 of Title 47 of the Code of Federal Regulations. The rules are more complex and burdensome than necessary to meet the Commission's obligations, and, in some respects, are ambiguous or vague. Those issues are addressed below.

1. Lawful Authorization Requirement

Proposed rule 64.1703 states:

> An employee or officer of a telecommunications carrier shall assist in intercepting and disclosing to a third party a wire, oral or electronic communication or shall provide access to call-identifying information only upon receiving a court order or other lawful authorization.

AT&T has several concerns with this phrasing. First, CALEA only applies to electronic or wire communications, not oral.[52] Carriers would have no role or obligation to facilitate surveillance of oral communications.

Second, carriers do not "assist in intercepting" communications. Law enforcement, in strict accordance with Title III, actually conducts the interception. Carriers, under CALEA, enable government to intercept communications or access call-identifying information and provide "technical assistance" under 18 U.S.C. § 2518. This is an important distinction that must be maintained to protect carriers from potential liability.

Third, the prohibition itself is too broadly written. Carriers have the right to intercept communications to protect their rights or property without prior judicial authorization, for example.[53] AT&T does not believe the Commission intended to reach this common carrier exception, especially given that the Commission's role under Section 229 of the Communications Act is limited to the implementation of Section 105 of CALEA. Further, Section 2520(d) of Title 18 provides that carriers have a complete defense against any claim brought for a violation of the wiretap laws if the carrier acts with a good faith reliance on, in addition to a court order, a legislative or statutory authorization. The proposed rule would seem to limit this defense.

Fourth, the proposed rule also appears to limit disclosure of intercepted communications and call-identifying information to third parties after presentation of a court order or other lawful authorization. The proposal is ambiguous and vague. The wiretap laws already define the precise terms and conditions under which a carrier can disclose the contents of

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[52] See 47 U.S.C. § 1002(a).

[53] 18 U.S.C. § 2511(2)(a)(i).

intercepted communications or call-identifying information.[54] The Commission's proposed rule seriously confuses the law applicable to carrier disclosure.

In light of these concerns, the proposed rule should be modified to state affirmatively that employees or officers of a telecommunications carrier providing technical assistance to law enforcement pursuant to lawful authorization shall require law enforcement to present a court order or other lawful authorization[55] before providing such assistance. Further, the Commission should specify that nothing in the rules is intended to change the rights and defenses of carriers under Title 18 relating to electronic surveillance in general.

Some of the confusion in the rule may stem from the Commission's determination that CALEA's reference to "authorization" in regard to security procedures is intended to mean some internal carrier authorization. AT&T disagrees and believes that a close reading of Section 229(b)(1) in connection with the remaining provisions of CALEA suggests that "appropriate authorization" as used in this provision refers to the authorization provided by law enforcement to the carrier. CALEA does not require the creation of some new internal authorization form for a carrier to authorize its employees to provide lawful assistance.

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54 See, e.g., 18 U.S.C. § 2517.

55 AT&T assumes that the Commission is referring to a broad range of other lawful authorization in this rule, including a variety of state lawful processes or exigent circumstances, but the rule could be clearer on this point. The Commission correctly recognizes the need to ensure that the exigent circumstances exception to the written order requirements of the wiretap laws are not used as a pretext for warrantless electronic surveillance. AWS's policy, for example, has a detailed explanation of exigent circumstances, particularly because many non-law enforcement personnel might mistake the statutory circumstances that actually give rise to the exigency for any "emergency" proffered by the requesting agency. AWS has prepared a form for law enforcement to execute that sets forth the nature of the exigency and the authorization. AWS also requires that the order be produced within 48 hours or the wiretap is removed.

Rather, the need for the Section 229(b)(1) provision arises because of the various types of requests that a carrier might receive from law enforcement for information, each of which may require different types of authorizations. Some of these authorizations were changed by CALEA. For example, location information contained in transactional records now can only be provided upon a court order based on specific and articulable facts.

Congress did not intend to have the Commission dictate the form of the internal communication to the employee to execute a wiretap order. It is enough if the carrier receives a facially valid order for an employee to execute the order. Title 18, in Sections 2511 and 2520, provides the implementing carrier with immunity for complying with the order and such immunity extends to any employee or officer of the company. This is the authorization to which CALEA Section 229 refers, not internal carrier documentation.

AT&T certainly recognizes the gravity of each surveillance order it acts upon. The Commission should be aware that most major carriers also implement wiretaps under the Foreign Intelligence Surveillance Act ("FISA") for national security purposes. These wiretaps are ultra-sensitive and carriers are obligated by regulation to follow strict security procedures in the implementation of the surveillance. The proposed rules here for routine surveillance bear a striking resemblance to FISA procedures. The Commission should be hesitant to raise the bar so high on routine law enforcement investigations. A FISA-standard for pen register orders is not appropriate, especially when the law provides sufficient incentives to avoid any breaches, including contempt, civil penalties, and obstruction of justice charges.

2. Designation of Employees or Officers to Assist Law Enforcement

The Commission proposes to require carriers to designate certain employees and officers as responsible for conducting electronic surveillance. The Commission would require carriers to have an express policy statement in their procedures to this effect and conversely to

permit nondesignated employees to conduct only administrative activities in regard to surveillance if such surveillance is unknown to them.[56]

CALEA does require that carriers establish appropriate policies for the supervision and control of their employees and officers to require appropriate authorization to activate surveillance.[57] But the critical element in CALEA is the procedure for authorizing activation of surveillance, not for identifying the personnel who will provide technical assistance. AT&T, for example, has certain identified personnel that are responsible for electronic surveillance. These personnel have a clear understanding of their duties in the security department. The formality of a written designation is not required to ensure compliance. It is worth noting that that carrier personnel involved in electronic surveillance often are assigned in the carrier security department, which further evidences their trustworthiness and the reliance carriers place upon their integrity.

Personnel not responsible for conducting electronic surveillance need no written procedure to make clear that such activities are not within their scope of employment. Any employee that conducts unauthorized wiretapping would be terminated and could face civil or criminal prosecution.

The Commission suggests that nondesignated personnel may be involved unknowingly in some aspects of wiretapping.[58] The Commission proposes to create a separate recordkeeping function for these employees under the close scrutiny of a high level supervisor or company officer.[59] This approach would be unduly burdensome and completely unnecessary.

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56 NPRM, ¶ 30.

57 47 U.S.C. § 229(b)(1).

58 NPRM, ¶ 30.

59 Id.

The purpose of the security rules should not be to stamp out any prospect of a security breach whatsoever at any cost. Rather, the point should be to ensure that carriers are prudent in the administration of wiretaps. Therefore, regulation designed to eliminate any and all potential for a possible security breach is unnecessary.

3. Employee Affidavits/Lawful Interceptions

Perhaps the most intrusive proposal in the NPRM is the idea of an employee wiretap affidavit. Nowhere in CALEA or the wiretap laws is there any requirements for a certification by an employee that he or she will not disclose information to any person not authorized by statute or court order, or to provide the name of each employee he or she believes has knowledge of the wiretap.

Such employees would not be performing electronic surveillance in the first place if they had not been designated to do so by the carrier. The FBI, in its proposals to the Commission for security procedures, apparently believes that there is an abundance of informal, unauthorized discussions about surveillance that an affidavit procedure will somehow cure. This assumption is patently offensive to the professionals who work within the security departments of carriers.

Further, the Commission asks for comment on how its rules might affect carrier immunity under Sections 2511 and 2520 of Title 18.[60] A carrier would not be vicariously liable for the illegal acts of an employee who, outside the scope of employment, commits an illegal act of interception or disclosure of private communications.

Apparently, the Commission reads Section 105 as a strict liability statute, imposing liability on a carrier for any unlawful interception that occurs on its premises.[61] In fact, Section

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60 NPRM, ¶ 27.

61 See NPRM, ¶ 27.

105 was drafted to ensure that law enforcement would not have the capability to activate a wiretap remotely without affirmative carrier intervention, not to guard against some hypothetical, internal carrier breach.[62] Section 229 does no more than implement Section 105. The Commission reads too much into Section 105 when it imposes a broader duty on carriers.

The Commission, by proposing to impose the broad duty to protect against unlawful interceptions, opens a Pandora's box of potential litigation. It is unclear to whom such a duty would flow. Neither CALEA Section 105 nor Section 229 of the Communications Act were intended to deprive carriers of their statutory immunity or to subject them to negligence actions for the intentional acts of others. The FBI proposal to require reporting of such information to the Commission only exacerbates the potential problem.

4. Carrier Records

Carriers routinely maintain, in the ordinary course of business, records necessary to show their good faith compliance with lawful authorization to conduct surveillance in the event a civil or criminal claim is brought under Section 2520 of Title 18. The Commission proposals, however, go well beyond any record a carrier might maintain for business purposes. A carrier's ordinary business records should be sufficient to satisfy any CALEA obligation.

Section 229 of the Communications Act requires carriers "to maintain secure and accurate records of any interception or access with or without such authorization."[63] The

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62 House Report at 3506.

63 The Commission has said that it believes the "without such authorization" means that carriers must report *unlawful* interceptions that it discovers. AT&T submits that this ambiguity in CALEA is most likely resolved by reference to Section 105 again. Congress intended to prevent law enforcement from directly activating wiretaps. The "without authorization" language in Section 229 undoubtedly refers to a carrier's discovery of law enforcement wiretaps that were not activated by carrier personnel.

Commission proposes that carriers collect much more information than is necessary to ensure "accurate" records.

For example, proposed Rule 64.1704(b) would require carriers to provide "a complete discussion of the facts and circumstances surrounding the interception and disclosure." It is unclear whether the Commission intends carrier personnel to opine on the purpose of the wiretap or to otherwise go behind the face of the order, or to merely state that the wiretap was activated as ordered.

The Commission should be concerned (as should law enforcement) that the requirement of such detailed records may provide evidence that could be subject to subpoena and disclosure to defense counsel eager to identify any slight deviation between the carrier record and that of the law enforcement agency conducting the wiretapping. And of course there will be differences because it is not possible to synchronize the carrier records with those of the law enforcement agency. Just what form the narrative would take under this proposed rule is unclear, but it is clear that it is unnecessary and not advisable. AT&T urges the Commission to delete this requirement entirely.

The Commission also seeks comment on how long carriers should be required to keep records, proposing that the period be 10 years.[64] AT&T does not believe the Commission need specify any period of retention. Carriers have good and valid business reasons for maintaining their records at least as long as the longest statute of limitations in any state for a possible civil action under the state wiretap act. The period of time will vary from state to state and carriers should be allowed to set their own retention policies. By forcing carriers to adopt the 10-year retention period to coincide with law enforcement's obligation is to turn the carrier into an

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[64] NPRM, ¶ 32.

alternative entity for the conduct of discovery in the event law enforcement records are inadequate or defense counsel find some reason to review these records. The Commission should not put carriers at risk of such entanglements.

Finally, there were sound policy reasons for Congress imposing a 10-year retention period on the issuing court and the law enforcement applicant for such records. Such records are necessary for evidentiary purposes in what generally are the most serious criminal cases. The records also are necessary to demonstrate the integrity of the investigation over the long-term. These same consideration simply do not apply to carriers who are neither agents of law enforcement nor the courts.

5. Employee Contact List

It is as offensive as the employee affidavit for the FBI to propose to the Commission that carriers be required to maintain an official list of designated employees available upon request to law enforcement agencies that will include personal identifying information (e.g., DOB, SSN, phone, pager). This information can only be used for one purpose -- background checks by the agency. From a privacy point of view, there can be absolutely no justification for providing employees' dates of birth or social security numbers, and AT&T vigorously objects to the suggestion.

In any event, the standard practice in the field between law enforcement agents and carriers includes an exchange of contact information. The contacts on both sides are well known to each other and a great deal of cooperation occurs regularly. AT&T sees no need for a rule to ensure that law enforcement stays aware of the appropriate personnel to call for assistance.

6. Cost Effective Implementation

The Commission has not shown that the benefits of such regulation outweigh the costs. The more extensive the rules placed on carriers, the greater the costs will be to carriers to

implement CALEA and costs associated with complying with CALEA administrative requirements generally are not recoverable under the FBI's cost recovery rules.

In Executive Order No. 12866, President Clinton placed requirements on federal agencies to perform cost-benefit analyses of intended regulations and to propose regulations only upon a reasoned determination that the benefits of the intended regulation justify its costs.[65] The Commission has presented no evidence that the costs and benefits of its proposed rules have been considered. Until such time that the Commission can justify the cost burdens that it proposes to impose on carriers, it should refrain from dictating carrier operating procedures. These can be better handled by carriers themselves and are likely to be more cost-effective. The hallmark of CALEA is reasonableness.[66] The costs of regulations must be looked at under this reasonableness standard and weighed against potential benefits.

AT&T suggests that the Commission carefully review existing carrier practices before imposing unnecessary new rules that could interfere with practices that are currently working well to protect privacy.

D. Definition of Telecommunications Carrier

1. Congress Intended a Narrow Definition of Telecommunications Carriers Subject to the Section 103 Requirements of CALEA.

The House Report accompanying the CALEA legislation emphasizes the narrow scope that Congress intended with regard to entities subject to the functional provisions of CALEA in a subsection appropriately entitled "Narrow Scope":

> It is also important from a privacy standpoint to recognize that the scope of the legislation has been greatly narrowed. The only entities required to

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65 Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

66 See Joint Hearings, 103 Cong. at 115 (prepared statement of Louis J. Freeh on behalf of the FBI).

> comply with the functional requirements are telecommunications common carriers, the components of the public switched network where law enforcement agencies have always served most of their surveillance orders. Further, such carriers are required to comply only with respect to services or facilities that provide a customer or subscriber with the ability to originate, terminate or direct communications.[67]

Moreover, the Director of the FBI concurred with this narrow scope when he stated that "the legislation is narrowly focused on where the vast majority of our problems exist: the networks of common carriers, a segment of the industry which historically has been subject to regulation."[68]

AT&T is concerned about the proposal of the Commission to include in its definition of a telecommunications carrier for purposes of CALEA "any entity that holds itself out to serve the public indiscriminately in provision of any telecommunications service."[69] Clearly, this is broader than the definition intended by Congress -- a definition that was focused on including only those carriers providing services that actually provide a subscriber with the ability to originate, terminate or direct telecommunication services. An overbroad or ambiguous definition of "telecommunications carrier" may jeopardize services never intended to be subject to the functional requirements of CALEA.

AT&T concurs with the Commission that all the entities in its list of examples of telecommunications carriers are subject to CALEA Section 103 requirements if they (i) offer telecommunications services for hire to the public and (ii) provide the subscriber with the ability to originate, terminate or direct calls. There is no reason to go beyond that list today. The Commission retains authority to consider extending the coverage of CALEA in the future to any

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67 House Report at 3498.

68 Joint Hearings, 103 Cong. at 7 (Statement of Louis J. Freeh, Director, FBI).

69 NPRM, ¶16.

class or category of telecommunications carrier to the extent the Commission finds that a service is a replacement for a substantial portion of the local telephone exchange service and that it is in the public interest to be covered by CALEA.[70]

As to those carriers in the Commission's list, regulatory parity is important. It has long been the intent of Congress that competition in telecommunications not be unreasonably impaired by regulations placed on telecommunications carriers. Economic forces, not regulatory burdens, should drive the markets for telecommunications. Disparate impacts on certain common carriers should be dealt with through Section 109(b) determinations, which either relieve a carrier from compliance or provide cost reimbursement.[71]

2. All Information Services Should Be Excluded From Section 103 Requirements.

While tentatively concluding that "providers of exclusively information services . . . are excluded from CALEA's requirements," the Commission seeks comment on the applicability of CALEA's requirements to information services provided by common carriers.[72] Section 102(8)

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[70] 47 U.S.C. § 1001(8)(B)(ii). AT&T also agrees that the definitions of telecommunications carriers and information services for CALEA purposes were unchanged by the definitions of these terms in the Telecommunications Act of 1996 ("1996 Act"). Section 601(c)(1) of the 1996 Act specifically provides:

> This Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State or local law unless expressly so provided in such Act or amendments.

[71] The Commission has asked whether any categories of providers should be exempt from coverage at this time. AT&T does not propose any such categories at this time but asks the Commission to recognize that new services may arise that warrant such an exemption in the future. The Commission could act pursuant to a petition for rulemaking by any interested party or sua sponte. There is no reason in this proceeding to establish procedures for such determinations.

[72] NPRM, ¶ 20.

of CALEA explicitly excludes persons and entities from the definition of telecommunications carrier "insofar as they are engaged in providing information services."[73] Section 103(b)(2) of CALEA explicitly excludes information services as opposed to service providers from Section 103 requirements.[74] Thus, the CALEA exemption is not limited by its terms to those entities that "exclusively" provide such services.

There is nothing in CALEA or its legislative history to indicate that Congress expected the information services provided by common carriers to be treated any differently from those of other information service providers. In excluding information services, Congress not only was worried about regulatory burdens that might hinder the development of new technologies, but also had serious concerns that inclusion of information services would compromise privacy rights and the security of data. Thus, for example, Congress stated unequivocally -- without distinguishing between who provides the service -- that "[t]he storage of a message in a voice mail or E-mail 'box' is not covered by the bill."[75]

Congress was well aware at the time of CALEA's enactment that carriers also provided information services. If Congress intended to extend to carriers with information services the obligation to make such services meet Section 103 requirements, it would have said so in clear terms.

The Commission itself has recognized that carriers may provide both telecommunication and information services, and has tailored its rules to embrace only the

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[73] 47 U.S.C. § 1001(8).

[74] 47 U.S.C. § 1002(b)(2).

[75] House Report at 3503.

regulated telecommunications services of such carriers.[76] For the Commission to fail to do so here -- especially in light of its lack of jurisdiction over information services -- would be arbitrary and capricious.

Further, the interpretation that the CALEA exemption also applies to information services provided by telecommunication carriers is supported by the Commission's efforts to treat substantially similar communications services alike and to apply regulatory parity where appropriate. Service providers should not gain competitive advantages as a result of regulatory burdens placed on competitors. If expensive CALEA burdens are placed on information services provided by AT&T and other common carriers but not on other information providers, carriers who provide both telecommunications and information services will have their ability to compete in the market for information services compromised.

Telecommunications carriers are responsible for many innovations in information services and placing costly CALEA burdens on their innovative new services would keep many of these innovations from being introduced. Many of these services are costly to develop initially and bring in limited revenues in their early years. The added costs of CALEA compliance would make new information services offered by telecommunications carriers less economically viable and dampen the development and deployment of technology that might ultimately serve the public well.

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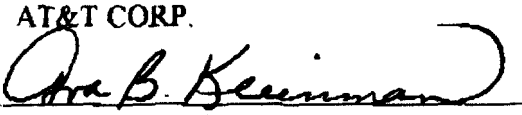
[76] See, e.g., Northwestern Bell Telephone Company Petition for Declaratory Ruling, Memorandum Opinion and Order, 2 FCC Rcd 5986 (1987); and WATS Related and Other Amendments of Part 69 of the Commission's Rules, Memorandum Opinion and Order, 3 FCC Rcd 496, 497 (1988)("[A]ny entity that actually provides enhanced services is treated as an 'enhanced service provider' for access charge purposes with respect to enhanced services, regardless of any other services that entity might provide.")

III. CONCLUSION

AT&T welcomes the opportunity to comment on the Commission's proposals to implement the CALEA requirements, and urges the Commission to adopt its proposed rules with the modifications recommended here.

Respectfully submitted,

AT&T CORP.

By 

Mark C. Rosenblum
Ava B. Kleinman
Seth S. Gross
Room 3252J1
295 North Maple Avenue
Basking Ridge, New Jersey 07920
(908) 221-8312

Roseanna DeMaria
AT&T Wireless Services
Room 1731
32 Avenue of the Americas
New York, New York 10013
(212) 830-6364

December 12, 1997